California Regional Water Quality Control Board
Santa Ana Region

December 3, 2002

ITEM: 12

SUBJECT: Deliberations on Shay Road Administrative Civil Liability Complaints for Ronald G Taylor and John K. Justice, Big Bear Lake, San Bernardino County

DISCUSSION:

On September 6, 2002, the Regional Board conducted a hearing in Loma Linda, to receive testimony regarding Administrative Civil Liability Complaints No. RB8-2002-0064 and No. RB8-2002-0065, issued by the Executive Officer on August 2, 2002, to Mr. John Justice, and Mr. Ronald Taylor, two property owners in the Bear Valley waste discharge prohibition area. After a presentation by Board staff, and cross examination by legal counsel representing the two property owners, it was agreed by all to leave the record "open," and to allow the property owners' legal counsel to submit a written closing argument. That was to be followed by a response from staff, and finally a response to the staff comments by the property owners. This process was concluded by late October. No further evidence or testimony will be received.

These documents were transmitted individually to the Board as they were produced/received by staff. They are being transmitted again as a bundled attachment for ease of review. Attached are the following:

- Original Staff Report for the September 6, 2002 agenda (less exhibits)
- Closing Brief from McCormick, Kidman & Behrens dated September 19, 2002 (less exhibits)
- Staff's response to Closing Brief (Staff Report dated December 3, 2002 - sent October 4, 2002)
- Reply Brief from McCormick, Kidman & Behrens dated October 18, 2002

California Regional Water Quality Control Board
Santa Ana Region

December 3, 2002

SUBJECT:

Administrative Civil Liability Complaint No. RB8-2002-0064 and No. RB8-2002-0065 issued to John J. Justice and Ronald G. Taylor (two property owners on Shay Road in Bear Valley) for discharging wastes in violation of Cease and Desist Order No. 00-83, and the Waste Discharge Prohibition contained in the Water Quality Control Plan for the Santa Ana River Basin.

DISCUSSION:

On September 6, 2002, a hearing was held by the Regional Board in Loma Linda, California, to hear testimony regarding Administrative Civil Liability Complaints No. RB8-2002-0064 and No. RB8-2002-0065, issued by the Executive Officer on August 2, 2002, to Mr. John Justice, and Mr. Ronald Taylor, two property owners in the Bear Valley waste discharge prohibition area. After a presentation by Board staff, and cross examination by legal counsel representing the two property owners, the record was left "open," and the legal counsel for the property owners was allowed to submit a written closing argument within two weeks. The closing argument was to be followed by a response from staff, and finally, a response to the staff comments by the property owners. This process was to be concluded by late October, and submitted to the Board members in time for a final vote at the December 3, 2002 Board meeting.

These staff comments respond to portions of the closing brief dated September 20, 2002, which we received from legal counsel representing Mr. Justice and Mr. Taylor. Portions that follow in bold or italics represent excerpts (verbatim or summarized) taken from the closing brief.

Closing Brief Part IV. Chronology of waste discharge prohibitions shows that the subject disposal systems were "grandfathered."

In this portion of the document, the parties contend that the changing of exemption criteria and compliance deadlines for the Bear Valley Waste Discharge Prohibition demonstrate that they were not affected by it. We disagree. Mr. Justice and Mr. Taylor have been in violation of the Board's Bear Valley Waste Discharge Prohibition since the date that they started using their subsurface disposal systems, and they have been given ample time to comply with the prohibition.

In 1972, the Regional Board adopted a Basin Plan amendment that prohibited the use of subsurface disposal systems (septic tanks) in the Bear Valley area. The Board required all of the systems existing at that time, and any project that received a temporary exemption, to comply with the prohibition (eliminate discharges to the

subsurface disposal system) by July 1, 1977. This date was extended to July 1980 by Board action on March 18, 1977. The Board further established criteria that must be met for the installation of any new systems, and the continued use of any existing systems. Mr. Justice and Mr. Taylor's subsurface disposal systems (SSDS) were installed without an exemption from the Board, and in violation of the prohibition, in 1975 (Taylor residence), and 1979 (Justice residence). At the time these systems were installed, the Board's exemption criteria did not allow the use of any system on a lot within 100 feet of the high water level of Baldwin Lake.

In 1981, Resolution 81-206 amended the original exemption criteria by adding special exemption criteria for U.S. Forest Service tracts. The Board also relaxed the exemption criteria for other privately owned lots. The new criteria allow an exemption from the waste discharge prohibition if an acceptable engineering report, containing, geologic and hydrologic evidence demonstrating that the continued use, operation, or maintenance of the subsurface waste disposal system would not, individually or collectively, directly or indirectly, affect water quality, is submitted.

Arguments made by the owners on page three of their closing brief, using clauses from past Board staff report relating to changes in the exemption criteria, are not relevant in any way to this issue. They simply discuss hardships that could occur if the subsequent criteria change were not to be made. The criteria change was made, in part, based on the assertions in the staff report. In addition, the contention that the compliance dates for the prohibition were later than the dates that the systems were installed, somehow "grandfathers" or exempts, them from the prohibition is false. There was never any grandfather clause or distinction between properties which were installed before or after the prohibition effective date. Also, changes to the exemption criteria did not in any way diminish the need for the property owners to comply with the criteria in force at the time they were using their systems.

Closing Brief Part V. Controlling evidence shows that the cease and desist order and, therefore, assessment of administrative civil liability are improper.

Owners contend in their brief that there is no evidence of a discharge to the waters of the State because:

- *"There is no groundwater within 10 feet below the ground of the leach fields." (Horne 9/6/02 letter).*

Evidence in the record demonstrates that a perched table can exist, at times, over a regional aquitard, which Mr. Horne himself has already acknowledged exists in the area. Evidence also shows that this water table can be within 10 feet of the bottom of the leach lines.

- *"An aquatard at least 50 feet deep exists below the properties." (Horne 9/6/02 letter)*

This is consistent with the findings and conclusions. In addition to restricting the upward movement of water in the lower aquifer, this aquitard also restricts the downward movement of water percolating through surface soils. Since the water cannot percolate any further when it reaches the aquitard, a perched groundwater condition is formed. Evidence shows that this perched water has risen to within a few feet of the ground surface.

- *"There is no evidence of contamination from the septic systems." (Horne 9/6/02 letter)*

We do not believe that the limited borings done around the septic tanks demonstrate no past contamination. They only evaluate the soil in the spot that they were taken. They also do not demonstrate the lack of risk of future contamination from documented high groundwater.

- *"The septic systems have been properly maintained and have functioned without any problems for over twenty years."*

We only have the owners' word on this and no corroboration from any other sources. The evidence of historic high groundwater in the area makes the point moot, however, because when groundwater approaches its historic high levels again, the systems will be inundated.

Owners contend that the cost to connect to the public sewer would be excessive

- *"It would cost between $50,000 and $100,000 for each of the property owners to establish a lateral hook-up to the BBCCSD sewer system."*

Based on conversations by staff with the Big Bear Community Services District and others, we believe that it would cost far below $50,000 for laterals. We do not have enough information to categorically refute this claim, but our sources stated that the work could be done for between $5,000 and $6,000.

- *"It would cost approximately $80,000 for a bonded contractor to construct a sewer main to which lateral hook-up would connect."*

It is possible that the final cost would be $80,000, although a bid was received for $47,465 in 2001 from a local contractor. Even at $80,000, that would be only $20,000 per resident, but we believe a lower bid could be obtained.

Owners contend that connection to the public sewer poses a greater environmental risk than the status quo.

- *"The BBCCSD sewer system has nearly a 50% failure rate for the sewer system zone in which the Justice and Taylor properties are located."*

In a conversation that Board staff had with Mr. Gary Cecil of Big Bear City Community Services district on October 3, 2002, the defect rate of sewer pipes in the vicinity of Shay Road was discussed. The estimated defect percentage of 23% from physical inspections, and up to 44% from flow isolations, represents the maximum defect rate, based on **infiltration** into a pipe from high groundwater. The amount of sewage waste leaving the pipes is not calculated separately, and therefore the defect rate affecting exfiltration could be much lower than the percentages listed above. Many of these holes self seal from grease in the lines which eventually clogs the hole, and prevents exfiltration from it. The District is conducting ongoing repairs to these problems, and over the next few years, the defect rate should come down steadily, especially in areas such as Basin 13 where Shay Road is located.

In any event, failures in any sewer system never justify discharges to substandard subsurface disposal systems such as those on Shay Road, that have the potential of being submerged during high groundwater conditions.

The owners' consultant contends that the borehole information cannot be extrapolated to evaluate soil and groundwater conditions at the owner leach fields several hundred feet away

- *The owners' consultant, Mr. Horne, contends that the water found in the 1998 Terra Geosciences report is not groundwater, because the aquifer is 50 to 60 feet below the ground surface, and that he found water because he was digging next to a creek. They also state that you cannot extrapolate that data to the area of the septic tanks to the south.*

We do not dispute the fact that there is a deeper aquifer. Our contention is that the aquitard that Mr. Horne has documented to exist in the area is continuous, and creates a regional perched condition north and south of Shay Road. We do not agree that this perched water is irrelevant or not groundwater. Perched water is groundwater, and often has contact with surface water and deeper aquifers. In this case, the greatest risk may be surfacing effluent as a result of high perched groundwater, which poses a health threat.

In addition, in discussions with Mr. Donn Schwartzkopf by Board staff, he states that none of his borings were done near any surface water. He stated that the closest boring to surface water was taken on the west end of Shay Road, about 25 feet from a small amount of standing (not flowing) water, which was on the north side of the road next to the Gilchrist property, in a culvert. The "ditch" on the south side of the road was dry at the time, and the small creek bed on the west side of Gilchrist's house was also dry, except for the small pool of standing water mentioned above. It was a sunny day, with no rainfall, which Boaaard staff corroborated by reviewing rainfall records obtained from San Bernardino County Flood Control District. Mr. Schwartzkopf also stated that he was utilizing sensitive seismic equipment, which would have been unusable in a wet area.

- *In the owners closing brief, based on Mr. Justice's testimony in the 9/6/02 transcripts, it is stated that Mr. Schwartzkopf conducted his study on a rainy day following weeks of "heavy rain," and that it had been raining steadily for a week. Mr. Justice also indicated that the "ditch" on the south side of the road had significant amounts of water in it.*

Rainfall data (acquired from San Bernardino County Flood Control District) taken from the rain gauge at BBCCSD, about 2 miles west of Baldwin Lake and Shay Road, show **no precipitation for twelve days prior** to Mr. Schwartzkopf's visit, and **no rain on the day of his visit**. Between April 16 and May 26, 2002, the day of the investigation, there was a total of 1.2 inches of rain at the BBCCSD office, with 0.15 inches on April 24th, 0.40 inches on May 5, and 0.65 inches on May 13. The total rainfall in March was 2.2 inches, 1.1 inches in April, and 1.08 inches in May, at the BBCCSD rain gauge. Other rainfall gauges in the Big Bear area show similar levels for these months.

Mr. Schwartzkopf also asserted it was sunny, and the area was almost totally dry.

The reason that this is important is that in his testimony to the Board on September 6, 2002, and in his letter dated Septmeber 20, 2002, Mr. Horne stated that the water in the boreholes dug by Donn Schwartzkopf was a result of creek water and saturated conditions on the road. In his September 6, 2002 letter (Page 2, paragraph 2), Mr. Horne states, "The saturated zone measured by Swartzkopf was the product of an ephemeral flow of water which had been artificially diverted from its natural channel by a poorly constructed drainage culvert under the Old Shay Road." Dropping down to paragraph 4, he states, "The saturated lens of soil created by the temporary surface flow will provide enough water to flow into a shallow test hole (boring) but the condition of saturation is temporary." In his testimony to the Board on September 6, 2002, Mr. Horne stated that Schwartzkopf "found water because he was digging holes next to a creek, and it is just saturated for some short distance."

However, based on rainfall data and visual observations by Schwartzkopf himself (which can be verified by his assistant), this is simply not the case. The ditch and the creek were dry. The area received no rain for twelve days prior to his arrival, and very little rain in the weeks prior to that. The argument that the borings filled with water from rainy conditions is false.

Type of vegetation belies the aerial extent of saturated soils extrapolated from Schwartzkopf study.

- *Mr. Horne contends that because there are no phreatophyte plants (with roots in groundwater) in the vicinity of Shay Road, that this is proof that there is no high groundwater in the area.*

The lack of phreatophytes is not an indicator that high groundwater conditions have not occurred in this area. We contend that high groundwater occurs intermittently, but not often enough to support phreatophytes. This in no way negates the fact that when

groundwater does reach historically high levels, the owners' leachlines will be under water. The frequency of system failure is not the issue; occasional failures are not acceptable.

Temporary surface water, and associated soil saturation has no effect on groundwater.

- *Mr. Horne asserted that "water running across the surface temporarily in a given rainstorm has no impact whatsoever on a leach field."*

We agree with this statement, but it has no bearing on this issue. As stated earlier, rainfall data (acquired from San Bernardino County Flood Control District) taken from the rain gauge at BBCCSD, about 2 miles west of Baldwin Lake, shows no precipitation twelve days prior to Mr. Schwartzkopf's visit, and no rain on the day of his visit. He also asserted it was sunny, and the area was almost totally dry.

Aquatard separates leach fields from groundwater table

- *In Mr. Horne's testimony, he stated that there was no likelihood that groundwater would ever go up to the depth of the leach fields. He also stated in this brief that there was no likelihood that leach field wastes would ever reach the aquifer.*

We do not argue with Mr. Horne's conclusion that the level of the lower aquifer will not rise to the depth of the leach lines. Nevertheless, we have established that perched groundwater exists well above the level of the leach fields. Mr. Horne chooses only to focus on the deep aquifer, and completely ignore the perched groundwater.

Additional evidence submitted herewith establishes the Cease and Desist Order and, therefore, the assessment of Administrative Civil Liability are not based upon substantial evidence.

- *Mr. Horne states in his 9/20/02 letter that perched water found in the Schwartzkopf boreholes will not affect the septic tanks of the owners in the Shay Road area.*

This appears to contradict Mr. Horne's own testimony about the regional aquitard. If there is a regional aquitard, then the perched condition extends to the areas surrounding the borings, including the owner's leach fields, which are downgradient of the borings, and even closer to the the fringes of Baldwin Lake.

- *Mr. Horne refutes statements by the Board's Executive Officer, Gerard Thibeault, regarding mottling being an indicator of high historical groundwater. Mr. Horne states that "mottling of soils is not an indicator of the level of the groundwater, past, present, permanent, or perched."*

This statement appears to fly in the face of accepted methodology and practice for the siting of SSDSs. The County of Riverside Health Services Agency document entitled

"Waste Disposal for Individual Homes, Commercial and Industrial," contains a chapter entitled "Special Testing and Reporting Procedures in High Ground Water or Perched Water Areas." Section 4.4 of this chapter provides an excellent statement regarding the impact and significance of mottled soils as they relate to high groundwater. It states:

> A mottled soil is a soil that is marked with spots or blotches of contrasting color which is usually by saturation for some period during a normal year, unless it is artificially drained.
>
> There are several factors, which determine whether or not a site is suitable for subsurface purification of liquid effluent from a septic tank. The presence of groundwater within 5 feet of the surface for significant periods (one week or more) during near normal wet seasons can be the most difficult to determine. **Soil mottling, as used over the years to classify and map soils, has been increasingly used since 1960 as a reliable indicator in making this determination.** Soil mottling develops from the following process:
>
> With temperature above 40 degrees F., two basic types of bacteria are the agents, which decompose or oxidize organic matter in the soil. Aerobic bacteria are the primary agents as long as there is some air in the soil. As infiltrating water and/or a rise in groundwater completely fills all the air spaces and the soil becomes saturated, air and free oxygen are excluded and anaerobic bacteria become the primary decomposers. They utilize insoluble manganese and iron compounds instead of oxygen. In the chemical reactions that occur, manganese and iron ions are liberated from the otherwise insoluble oxide and hydroxide compounds and begins to flow in the soil solution. Since this action drains iron ions, a color reduction occurs in those areas tending to turn them gray or white. When these ions again encounter oxygen in aerated pores, they immediately recombine with oxygen to form yellow, orange and rust colored concentrations. Manganese ions are reoxidized and form black concentrations.
>
> If this process has prevailed for significant periods over recent geologic past, the resulting mottled soil colors can be quite readily observed. Hence, this historic recording of saturation in the soil can be used to estimate the groundwater level expected to occur during a near normal spring season. Experience has shown that this level can be predicted quite accurately at most sites.

A similar description of mottling can be found in the San Bernardino County Department of Environmental Health Services document entitled "On-site Waste Water Disposal System, Soil Percolation (PERC) Test Report Standards." As stated in the staff report for the September 6, 2002 Board meeting, Mr. Schwatzkopf observed uniform mottling in all 12 boreholes, at a consistent depth of two feet below the ground surface in every hole. Staff believes that this uniformity, along with the high water depths found in the boreholes, indicate historical high groundwater levels in the Shay road area of at least two feet below ground surface.

The real issue is not whether the groundwater is currently high, or has been high during the last few years. The issue is where the **historic levels** have been. The Board's and County's criteria for SSDS are based on **historic levels.**

The representatives for the owners are clouding the issue with their geotechnical studies, showing that current groundwater is nowhere near levels that could impact the operation of SSDSs. Nobody would expect to find high groundwater after an extended drought. The evidence in our possession demonstrates that historic groundwater levels are higher than the Board's guidelines allow for the use of SSDSs.

- *Mr. Horne states that the analysis of soil samples taken around the owners' leachfield proves no adverse impact from their systems.*

We believe that the limited sampling around these leach fields does not prove a lack of past, present or future contamination to local groundwater, because of its limited scope.

Closing Brief Part VI. Argument

The Owners contend that civil liability cannot be imposed because the cease and desist order upon which the ACL was based on was improper.

- *Based on Mr. Horne's testimony, the owners contend that the Board did not consider all relevant evidence when issuing the cease and desist order.*

Mr. Horne's concerns and ideas have been addressed in the previous section. There is ample evidence to demonstrate that high groundwater conditions have occurred and can occur in the future in this area.

The owners contend that their septic systems were constructed and approved by the County prior to 1980 pursuant to valid building permits issued by the county. Evidence shows that the owners septic systems meet and have always met the requirements for an exemption.

Mr. Taylor and Mr. Justice argue that they were "exempt" from the prohibition. This is not true because such an exemption would have had to be affirmatively provided by exercise of the Board's authority. Exemptions are not "automatic," as they appear to suggest. Rather, they have to be applied for, considered, and issued by action of the Board. No exemptions were issued to Taylor or Justice.

The Cease and Desist Order was proper. It is supported by substantial evidence. Mr. Taylor and Mr. Justice failed to submit a timely petition for review of the Order. While the SWRCB may have told them that their petition of December 7, 2001 was "premature," having been submitted more than 30 days beyond its adoption, it was also too late.

Mr. Taylor and Mr. Justice are wrong in assuming that it was the County who was to process exemptions to the prohibition. They are mistaken in arguing that they were recipients of exemptions. Rather, the Board retained the authority to do so. In reviewing an exemption request, the Board considers the County's determination regarding county criteria. If the County's criteria are met, a property is eligible for issuance of an exemption by the Board. If not, then the property is not eligible. In either event, it is the Regional Board that must issue the exemption to the Regional Board's prohibition. No delegation of the exemption determination has been made, and Mr. Taylor and Mr. Justice's assumption that this has occurred is misplaced.

The Board is not estopped from enforcing the Cease and Desist order because it never acted to lead Mr. Taylor and Mr. Justice to assume that they could rely on presumed "exemptions." To the extent Mr. Taylor and Mr. Justice assumed that they were eligible for exemptions, they relied on their own assumption to their own detriment. In this action, the Board is enforcing a Cease and Desist Order that was never validly challenged by Mr. Taylor and Mr. Justice, which has remained in effect since its issuance, which in turn enforces the prohibition for which Mr. Taylor and Mr. Justice were never issued exemptions.

The owners contend that civil liability cannot be imposed because they have been denied procedural due process.

- *The contention was made that the owners were denied the right to cross-examine a witness, specifically, Bill Norton of Board staff.*

Mr. Kidman complains that his clients were denied the opportunity to "adequately" cross-examine Bill Norton. In fact, Mr. Kidman was allowed to cross-examine Bill Norton. However, Mr. Kidman was several times asked to limit his cross-examination of Mr. Norton to matters in his knowledge. Mr. Kidman was advised that Mr. Norton did not have information regarding "Regional Board Policy," the subject of several of Mr. Kidman's questions. In fact, an offer was made to Mr. Kidman that another staff person (Mr. Kurt Berchtold, Board Assistant Executive Officer) with knowledge of Regional Board policy would be made available for cross-examination on the subject. Mr. Kidman refused this offer (see transcripts of 9/6/02 Board meeting).

- *The owners object to unspecified and unsubstantiated "anecdotal evidence" in the Board staff report and in testimony presented by staff at the hearing, claiming is was improper and must be disregarded.*

The paragraph cited by the owners in their brief is substantiated. The information about the owners' SSDS came from San Bernardino County Environmental Health Department. The comment about 1998 groundwater levels inundating the owners leach lines is an obvious conclusion made by Board staff from information at hand. The allusion to conditions on Shay Road is substantiated for the most part by sworn testimony from Mr. Neal McNeal of Shay Road. This testimony was given at the

October 6, 2000 Board meeting, and the September 6, 2002 Board Meeting, as well as other Board meetings in which he has spoken in the past two years.

However, in any event, hearsay and anecdotal information are not prohibited from use in Board hearings.

The Owners contend that the factors to be considered before issuing an ACL do not warrant such a penalty.

Mr. Norton clearly stated in his presentation that if Board staff were mistaken on the owner's ability to pay, and the owners applied and qualified for low income loans or grants, staff would conclude that the owners did not have the ability to pay (see transcripts of 9/6/02 Board meeting). To date, no information has been provided by the owners demonstrating their inability to pay the penalty.

In reference to the assertion that connection to the regional sewer would be disruptive to businesses being conducted by the owners, it is irrelevant to the analysis of these criteria whether their businesses/homes might be blocked off for a period of time during construction activities.

RECOMMENDATIONS (from September 6, 2002 Staff Report)

1. *Staff recommends that the Board affirm Administrative Civil Liability Complaint Nos. RB8-2002-0064 and RB8-2002-0065.*

2. *Staff recommends that the Board direct the Executive Officer to initiate collection proceedings should the property owners fail to pay the assessment on a timely basis.*

California Regional Water Quality Control Board
Santa Ana Region

December 3, 2002

ITEM: 12

Attachment A

Attachment B